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ABSTRACT

Proposed federal public employee bargaining legislation raises the issue of preemption. To what extent, if any, would and/or should federal legislation providing bargaining rights for state and local public employees preempt state legislation on terms and conditions of employment? The purpose of this analysis is to illustrate the importance of the question, to underscore the serious problems that may result, and to urge prior and comprehensive consideration of the impact of a federal public employee bargaining bill on state legislation. The topics of job security, retirement benefits, promotion, veterans' benefits, contract performance, sick leave, personal leave, military leave, maternity leave, lunch periods, wages, salary schedules, union security, teacher evaluation, residency requirements, legal defense, grievance procedures, arbitration, and supervisory employees are analyzed for potential conflicts between federal and state laws. The formulation of federal legislation that adequately takes preemption problems into account will be extremely difficult, but it appears to be essential to constructive national policy and to avoid a flood of litigation concerning preemption issues. (Author/DW)

January 16, 1975

An Exploratory Analysis of Preemption Problems Growing Out of Proposed Federal Legislation Providing Collective Bargaining Rights for State and Local Public Employees (H.R. 8677 and H.R. 9730, S. 3294 and S. 3295)

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Introduction

The following analysis of preemption problems arising out of proposed federal public employee bargaining legislation is excerpted from the principal investigator's study entitled Identification and Evaluation of State Legal Constraints Upon Educational Productivity. Although it raises several other issues, the final report for this study, which was funded by NIE, is now being completed; however, because of the urgency of preemption issues, a part of the study dealing with preemption issues is being disseminated at this time to interested parties.

It must be emphasized that the following analysis is not and was never intended to be a comprehensive or exhaustive analysis of preemption problems arising out of the proposed federal legislation. On the contrary, it is intended only to be illustrative and to highlight the need for a prompt and comprehensive study of preemption problems in connection with the proposed federal legislation.

This need is underscored by the pervasive neglect of preemption problems by interest groups and government bodies concerned about the proposed federal legislation. From June until early December 1974, the principal investigator interviewed a substantial number of national and state leaders in education. With only one exception, none appeared to be cognizant of the preemption problems discussed below, even though the problems have drastic implications for their interest groups, for educational governance, and for intergovernmental relations in this country. This was true regardless of whether the implications or potential consequences of the preemption issues were highly favorable or highly unfavorable to the particular interest group.

It should also be noted that the preemption problems considered below were not considered in the House and Senate hearings on H.R. 8677 and H.R. 9730. (These bills are identical to S. 3294 and S. 3295, introduced by Senator Harrison Williams. For editorial simplicity, the analysis will use the House numbers only). These hearings devoted considerable attention to what would and/or should be the relationships between a federal public employee bargaining law and the various state laws providing bargaining rights for state and local public employees. Although this issue is extremely important, it is quite different from the issue of to what extent, if any, should state legislation on terms and conditions of public employment be prempted by H.R. 8677 or H.R. 9730? Whether or not state public employee bargaining laws, such as New York's Taylor Act, should be preempted by H.R. 8677 or H.R. 9730 is clearly not determinative of whether the state retirement or state tenure or state civil service laws in states without bargaining laws are to be preempted by a federal statute.

Another limitation of the following analysis is its emphasis upon the legal issues involved. The analysis does not raise all the public policy issues or present the major options with respect to these issues. Again, its purpose is only to demonstrate the need for a more comprehensive analysis which does raise all the issues and analyze all the options relating thereto. It is obvious, however, from the limited analysis that follows that the preemption policy problems which must be faced raise some very difficult issues not only for Congress but within as well as between the various groups directly affected by federal public employee bargaining legislation.

The analysis is not intended either to support or to oppose a federal public employee bargaining law, whether it be H.R. 8677, H.R. 9730, or some other. Instead, the analysis is an attempt to delineate some issues that should be resolved insofar as bargaining rights for state and local public employees are under consideration.

Both H.R. 8677 and H.R. 9730 raise important preemption issues. However, since H.R. 8677 appears to include a preemption policy and H.R. 9730 does not, it may be helpful to explain why the following analysis is formulated largely in terms of H.R. 9730.

The basic reason is that the interest groups supporting a federal bill appear to be uniting over H.R. 9730 as the vehicle for enacting federal legislation. This is an impression which may be erroneous now, or it may become erroneous as circumstances develop. It is, however, more than sheer speculation as evidenced by the NEA's shift from acceptance of H.R. 9730 to active support of it in November, 1974.

Another factor was the lack of attention paid to the preemption policy embodied in Section 13(b) of H.R. 8677, which reads as follows (italics added): "All laws or parts of laws of the United States inconsistent with the provisions of this Act are modified or repealed as necessary to remove such inconsistency, and this Act shall take precedence over all ordinances, rules, regulations, or other enactments of any State, territory, or possession of the United States or any political subdivision thereof. Except as otherwise expressly provided herein, nothing contained in this Act shall be construed to deny or otherwise abridge any rights, privileges, or benefits granted by law to employees."

In effect, the policy set forth in Section 13(b) would prohibit preemption of any state statute providing employee rights, privileges or benefits. It is not clear to the principal investigator whether the lack of attention to this section of H.R. 8677 was due to lack of conviction that the bill would be a focal point of federal legislation, or whether it was due to the fact that the clause was not widely understood. At any rate, it is difficult to assume that Congress, in the absence of any public discussion of the matter, would specifically exempt all state legislation providing employee rights, privileges, or benefits, and preempt or remain silent on all other state legislation on terms and conditions of public employment. Clearly, state and local public management was not cognizant of the matter in 1974 and would have been certain to offer alternatives to 13(b) if it had been so cognizant. In addition, it might also be argued that preemption policies enunciated under the NLRA would not necessarily prevail under a separate federal law for public employees. Regardless, it appears that there has been virtually no public discussion of preemption problems under either H.R. 8677 or H.R. 9730 (again, it must be emphasized that the reference is not to preemption or possible preemption of state public employee bargaining laws, which has been the subject of considerable testimony before Congressional committees).

For these reasons, the fact that the following analysis is not as fully applicable to H.R. 8677 as it is to H.R. 9730 is not due to failure to recognize the differences between the bills, but results from the lack of discussion of the issues in the context of either bill.

Finally, no significance should be attached to the fact that some of the statutes cited are from states, such as New York, which might be exempt from federal coverage if it is decided to exempt states which have met certain criteria for exemption. Virtually all of the statutes cited are intended to illustrate legislation which exists in a number of states, including states which do not provide bargaining rights for public employees.

Memorandum

Bills were introduced during the 93rd Congress (H.R. 9730 by Congressman Thompson and S. 3294 by Senator Williams) that would have extended the National Labor Relations Act to employees of state and local governments. Unlike P.L. 93-360, which, while extending NLRA coverage to health care institutions (see NLRA #2(14)), made other changes in the NLRA (e.g., adding #8(g) and the Labor Management Relations Act (adding #213) to deal with the special problems of the health care industry, neither H.R. 9730 nor S. 3294 make any concessions to the special problems of public employment.* On the other hand, another pair of bills introduced during the 93rd Congress (H.R. 8677 by Congressman Clay and S. 3295 by Senator Williams) did assume a need for some concessions in this regard. H.R. 8677 would enact a National Public Employment Relations Act which would apply to states, territories and possessions of the United States and political subdivisions thereof, but would also enact substantive and procedural provisions that vary from those of the NLRA. Moreover, H.R. 8677 would preserve state collective bargaining laws that are substantially equivalent to the federal legislation elsewhere included in H.R. 8677. The constitutionality and desirability of extending NLRA coverage to state

*the "# sign" is used to denote the section throughout this memorandum

and municipal employment were discussed at committee hearings on the two bills. These hearings, however, have thus far failed to raise or deal with the following question: To what extent, if any, would and/or should federal legislation providing bargaining rights for state and local public employees preempt state legislation on terms and conditions of employment for state and local government employees? The purpose of this analysis is to illustrate the importance of this question and to underscore the serious problems that are likely to result if the question is not fully explored and resolved in any federal legislation along the lines of either H.R. 8677 or H.R. 9730.

At least since 1882 when New York State, the first state to do so, enacted its first Civil Service Law, the states have enacted a growing body of legislation governing terms and conditions of employment for state and local public employees. Undoubtedly a great deal of this legislation provides benefits and protections for public employees. Quite possibly, some of it was enacted partly because state and local public employees lacked bargaining rights. Regardless, it is crucially important to recognize that the legislation deals with matters that are mandatory subjects of bargaining under the NLRA. Were NLRA coverage extended to state and municipal employment and the prevailing doctrine of preemption of federal law to apply (see Garner v. Teamsters Local 776, 346 U.S. 485 (1953), most, if not all state laws dealing with mandatory subjects of bargaining under the NLRA would be invalidated.*

The state laws potentially subject to preemption include some employer as well as some employee protections. They also appear to include a great deal of legislation which appears to favor, or could favor, either employers or employees, depending on

*see also San Diego Building Trades Council v. Garmon, 359 U.S. 236,(1959)

the circumstances. Thus in calling attention to the preemption issue, no claim is made that the statutory benefits and protections for public employees under state laws justify the exclusion of such employees from NLRA coverage or that such benefits and protections should be forfeited upon extension of NLRA to public employment. Neither is it argued that these benefits and protections should be preserved notwithstanding NLRA coverage. Rather, the intent is to urge prior and comprehensive consideration of the impact of a federal public employee bargaining bill upon state legislation on terms and conditions of employment for public employees. After judgments are made as to what should be done about the various state laws, proposed federal legislation can be drafted to reflect those judgments.

Moreover, in addition to the fact that extension of the NLRA to public employment in conjunction with the preemption doctrine would force public employers and public employee unions to bargain over many matters which are now resolved by legislation (e.g., retirement benefits) such federal legislation may affect public employees in other ways. For example, some supervisory employees in the public sector who now enjoy collective bargaining rights under state legislation, as in Massachusetts and New Jersey, would appear to lose them under NLRA coverage.

State legislation on public employment is usually found in Civil Service and Education Codes, but it may appear anywhere within a state's statutory law. Similar provisions may appear as regulations of a state agency such as a civil service commission or an education commissioner; in some instances they may even appear in state constitutions. The extent to which such provisions would be preempted by the extension of the NLRA coverage to public

employment is not altogether clear. In theory the duty of the parties "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment..." (NLRA #8 (a)) should require them to bargain over each such term or condition of employment notwithstanding the provisions of a state law dealing with such term or condition. Moreover, just as the public employer might be obligated to bargain about a demand that it provide benefits and protections in excess of those required by statute, so might a union be required to bargain over an employer's demand that benefits or protections be reduced to a substatutory level. Just as the union, after bargaining to impasse, could strike if its demands were refused, so could the public employer, after bargaining to impasse, choose to take a strike by standing on its position and telling the union that it can take it or leave it. The point made here is not that public employee unions should (or should not) be allowed to bargain for benefits above a statutory minimum. Nor is it that public employers should (or should not) be allowed to bargain for less than a state mandated minimum. It is that a clear resolution of these issues is needed in any federal legislation providing bargaining rights for state and local public employees.

Notwithstanding the view that extension of the NLRA to public employment without further amendment would preempt state enactments covering terms and conditions of public employment, two legal doctrines point in the other direction. Over a period of years, some of the protections contained in civil service type laws have been elevated to constitutional status. For example, the decisions of the United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972)

recognize that teachers may have property rights in their jobs, of which they cannot be deprived without due proces (see also Arnett v. Kennedy, 416 U.S.C. 134 (1974)).

A second consideration is that some of the statutes might be specifically authorized under federal law and thus not subject to preemption. For example, the Fair Labor Standards Act #18(a) provides: "No provision of this Act or of any part thereof shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act." Similarly, the Occupational Safety and Health Act (29 USC #667(a)) provides that "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 755 of this title.", and OSHA does not apply to state or municipal employees (29 USE #652(5)).

A third classification of state legislation governing public employment that might not be preempted consists of legislation applicable to employment generally, such as the provision of workmen's compensation benefits. Even for some of this legislation, however, preemption issues may arise even though they may not have been settled in the private sector. For example, the provision of the Rhode Island Unemployment Insurance Law that gives unemployment

compensation to strikers has recently been challenged as being preempted by the National Labor Relations Act, and the status of that law is now uncertain (Grinnell Corp. v. Hackett, 475 F 2d 449, 1st Cir., 1973).

Some examples of the legislation affecting public employees that would appear to be subject to preemption should public employment come under the NLRA are listed below. The listing was compiled by reference to the laws of only a few states and is not comprehensive even for those states. The purpose in presenting it is to illustrate the pervasive nature of preemption problems and to underscore the need for a more comprehensive study of state legislation on terms and condition of public employment, especially such legislation which is potentially at least subject to preemption Preemption policy should be explicit in federal legislation, but such policy should be made with full knowledge of the statutes involved.

Although most of the state laws cited below specify benefits and protections to public employees, some are designed for the benefit and protection of public employers. There are also many laws that specify procedural or substantive terms and conditions of employment which may alternately benefit either governments or their employees, depending upon the particular circumstances of a situation. In any case, the laws cited are illustrative, not necessarily representative. Simply counting the number of statutes which appear to favor public management, public employees unions, or are "neutral" is apt to be misleading. Many public employee unions would gladly give up several statutory benefits for the right to strike, i.e., statutory benefits and restrictions are not

of equal weight. Secondly, as a practical matter, members of Congress will probably want to know the impact of any preemption policy upon their district or state, not simply the impact in general. In the third place, preemption policies may well be affected by the number of states involved. Whether five states or fifty have a law may be crucial as to whether or not the law should be preempted by a federal statute. For these and other reasons, the examples should not be interpreted as supporting or opposing the preemption policy of any particular interest group.

1. Job security

a. Tenure

Most civil service employees and teachers earn tenure after serving a probationary period. As tenured employees, they enjoy a high degree of job security. Job security, however, is a mandatory subject of negotiations, hence the tenure statutes would appear to be invalidated if the NLRA were extended to public employees. New York Civil Service Law #75 and 76 are typical of tenure statutes. Section 75 provides that no permanent employee in the competitive class of the state or municipal civil service shall be removed or otherwise subjected to any disciplinary penalty "except for incompetency of misconduct shown after a hearing upon stated charges pursuant to this section." Section 76 provides procedures by which an employee, believing himself aggrieved by his dismissal or some other disciplinary penalty, may appeal to the Civil Service Law. A lower state court has ruled that this agreement deprives employees of a constitutionally protected right to judicial review of their discipline (Antinore v. State of New York, 79 Misc. 2d 8 (1974)) and the State has appealed from that decision.

In 38 states and the District of Columbia, some type of teacher tenure law applies to all school districts in the state. In four additional states (Kansas, Nebraska, Oregon, and Wisconsn), legislation provides tenure in one or more of the largest districts, while most districts are not covered. In three states (California, New York, and Texas) tenure is optional or optional in certain districts. Five other states (Georgia, Mississippi, South Carolina, Utah, Vermont) provide for annual or long term contracts but not for tenure, at least on a state-wide basis.

As will be illustrated briefly, this tenure legislation varies enormously on every important dimension of tenure: Who is covered, the length of the probationary period, the causes for dismissal, the procedures for challenging dismissals, and so on. In some states, preemption would be welcomed by teacher unions; in others, it would be supported by school management. Approximately 30 states provide some form of tenure for supervisory or managerial personnel. Both preemption and exemption pose a number of difficult problems just in the tenure area alone (see Research Division, Teacher Tenure and Contracts, A Summary of State Statutes (Washington, D. C.: National Education Association, 1972), for a comprehensive summary of the state tenure statutes as of September 30, 1972).

b. Notice and procedures

New Hampshire law illustrates a legislative approach to tenure which is typical of a number of states. In New Hampshire (REA 189) a teacher who is not to be reappointed for the next school year must be notified by March 15 prior thereto if he has taught one or more years in a school district. Any such teacher who has taught for three or more years in a school district is entitled to a written statement specifying the reason that he is not being reappointed and a hearing before the school board. The hearing must comply with due process standards and the decision of a school board may be appealed to the State Board of Education. An additional hearing may then be held by an ad hoc review board. The review board must consider, either on the record or on the basis of its own hearing, whether the refusal to reappoint was:

"a. in violation of constitutional or statutory provisions;

b. in excess of the statutory authority of the agency;

c. made upon unlawful procedure;

d. affected by other error of law;

e. clearly erroneous in view of the reliable, prohibitive and substantial evidence on the whole record; or

f. arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This procedure points up a number of protections provided by the laws of many states. It requires notice before dismissal, the right to be given reasons for the dismissal and to a hearing, and the right to have the decision reviewed by higher authority.

Minnesota provides similar protections (Minnesota Law, #125.12 and 125.17). The Minnesota law (#125.12, subd.6) also limits the grounds for which a teacher may be terminated to: "(a) Inefficiency; (b) Neglect of duty, or persistent violation of school laws, rules, regulations or directives; (c) Conduct unbecoming a teacher which materially impairs his educational effectiveness; (d) Other good and sufficient grounds rendering the teacher unfit to perform his duties; or (e) Discontinuance of position, lack of pupils, or merger of classes caused by consolidation of districts or otherwise..."

Paragraph (e) above illustrates a potential difficulty of interpreting Section 13(b) of H.R. 8677. On its face, paragraph (e) above is a protection for teachers, hence not subject to preemption under 13 (b). On the other hand, some teacher organizations have negotiated seniority clauses that provide job security for all members of the bargaining unit, regardless of declining enrollments or discontinuation of positions. Conceivably, para-

graph (c) could be interpreted by employee unions in contradictory ways in the same state, perhaps even in different bargaining units under the same employer.

c. Layoff and reemployment

Section 2510 of the New York State Education Law, like the Minnesot law previously cited, deals with layoffs occasioned by the abolition of jobs. It provides for layoff in order of lowest seniority (see also New Jersey Ed. Law #18A:28-10). For this purpose, seniority is within a given tenure area and according to the courts (Baer v. Nyquist, 40 AD 2d 925 (197)) there are but few tenure areas and they cannot be subdivided by a school district. Consequently a complex system of bumping comes into play in the event of layoff. This system of bumping is unattractive to many school districts and some might seek to get rid of it through negotiations under the National Labor Relations Act. In the past, laws specifying the order of layoff were invoked chiefly in rural districts undergoing consolidation. In the future, they are likely to be invoked more often in urban and suburban districts experiencing a drop in enrollment, relatively little teacher turnover, and pressures to employ more minority teachers. Under these circumstances, whether these laws are preempted will become increasingly important.

d. Duration of probationary status

An important tenure consideration is the time that must be spent by an employee on probationary status. In education, the probationary period ranges from one to five years, with three years being the most common probationary period in state legislation.

Statutes specifying the length of a probationary term are another example of laws that may benefit employers in one situation and employees in another. As a matter of fact, enact-

ment of H.R. 8677 could lead to some paradoxical situations relating to probationary periods. In the private sector, probationary periods are typically less than three years and there is no doubt that teacher unions would bargain for shorter probationary periods if they have the right to do so. Suppose a teacher union bargains for a one year probationary period in a state which has a three year probationary period as part of a tenure law otherwise highly supported by teacher unions. Could the teachers bargain for a less than three year probationary period under 13(b), i.e., could they legally maintain the position that only the probationary period in the tenure law was preempted, since it and it alone was no longer a right, privilege, or benefit granted by law to public employees? And if an employee union has the right to bargain on, and perhaps reduce the statutory probationary period of three years to a few months in a collective agreement, would the state courts uphold the other parts of the statute in the absence of a severability clause? That is, if one part of a tenure statute (the probationary period) becomes a mandatory subject of bargaining, what is the legal status of the statute in the absence of a severability clause?

2. Retirement benefits - authority of employer to negotiate

Retirement as a mandatory subject of negotiations raises questions that go beyond the problem of preemption. The preemption problem is nevertheless very important. To a large extent, pension rights are constitutionally protected. Employees with vested benefits could not lose such rights through negotiations, but new employees coming into public employment could find themselves covered by negotiated pension plans that would be less attractive than those currently provided by statute (for examples of state laws establishing pension systems, see New Jersey Ed. Law #18A:66-1 et seq.; Florida Statutes #238; Minnesota Law #354 et seq.; California Ed. Code #13801 et seq.; New York State Retirement and Social Security Law, and New York C.S.L. #154 and 155).

As in the case of the tenure laws, in some instances, the protections afforded by state laws and/or state constitutions may be greater than those of federal law and the federal constitution. For example, the New York State Constitution, Article V, #7 protects the pension rights of public employees most generously. It has been interpreted as precluding the diminution of the interest that is to be credited to the account of a member of a pension system for his contributions (Cashman v. Teachers' Retirement Board, 301 NY 501 (1950)). It may even protect a member's interest in having applied to him more beneficial mortality tables (Matter of Ayman v. Teachers' Retirement Board, 9 NY 2d 119 (1960)).
One of the many issues raised by NLRA coverage is what happens to employee rights which are contractual by virtue of a state constitution which is itself preempted by federal statute?

Consideration of retirement benefits raises several important issues concerning the authority of public employers to negotiate. In many instances the powers of school districts, public benefit corporations and other governmental or quasi-governmental institutions are limited by the state legislature that created them. What happens when they are explicitly denied the power to perform an act, the performance of which is a mandatory subject of bargaining? Would extension of NLRA coverage to such governmental or quasi-governmental institutions invest them with powers that, by the terms of their corporate structures are ultra vires, or would their duty to negotiate fall short of the full range of mandatory subjects of bargaining by reason of limitations in the legislation creating them? Under NLRA coverage, would the state itself, as source of authority, have to be treated as a joint employer so that the full range of mandatory subjects of bargaining could be considered? If so, would the state be brought to the table at each negotiation or would some form of tiered bargaining emerge with bargaining on different terms of employment taking place in successive stages?

The difficulties are most acute in the area of retirement, where for actuarial purposes among others, many local government employees are covered by a single state retirement system. Under Minnesota Law #356.24, it is "unlawful for a school district or other governmental subdivision or state agency to...contribute public funds to a supplemental pension or deferred compensation plan which is maintained and operated in addition to a primary pension program for the benefit of governmental subdivision employees." New York State (Ret. and Soc. Sec. Law #444) establishes

maximum retirement benefits available to employees who join the New York State Employees Retirement System on or after July 1, 1973 and denies to local governments the power to create their own retirement systems (Ret. and Soc. Sec. Law #113).

As a matter of fact, it appears that extension of NLRA coverage to public employment, at least without amendment, would lead to basic changes in the very structure of state and local government. This might be desirable,but such change should not happen fortuitously. On the one hand, if public employers and public employee unions have the right to negotiate retirement benefits, it is virtually certain that some will opt out of state systems or negotiate changes that would make it impossible to maintain state retirement systems as we have known them. On the other hand, treating the state as employer for retirement purposes raises a different set of problems. Would there be a state wide bargaining agent for public employees? Would it be feasible to have public employees represented by one union at the local level, e.g., an AFT local, and a rival union at the state level, e.g., an NEA state affiliate? Who would bargain for public management, in view of the diffuse nature of legislative and executive responsibility for retirement systems? Would it be feasible to limit state-wide negotiations to retirement benefits? How would the timing of state-wide bargaining on retirement be coordinated with local bargaining so that local employers could estimate their total personnel costs with a reasonable degree of accuracy? And so on.

These are not assumed to be insoluble problems. After all, some contracts in the private sector cover hundreds of thousands of employees dispersed over several states. The point is that the solutions may involve changes which go far beyond negotiations and/or personnel policy, and which therefore have to be fully understood if they are not to solve one problem by creating others which are more troublesome.

3. Promotion

Closely related to tenure are promotion rights of public employees. New York State's Constitution, Article V, #6 provides that:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;'

Promotion within a bargaining unit, however, is a mandatory subject of negotiations. Public employers dissatisfied with the strictures of competitive examinations might try to avoid them through collective negotiations; so might unionized employees. Initial employment is less likely to be a mandatory subject of negotiations, at least to the extent that it would preempt state laws requiring competitive examinations (cf. NLRB v. Laney & Duke Co., 369 F.2d 859 (5th Cir., 1966)), but negotiations might deal with the establishment of hiring halls.

4. Veterans benefits

Many states have enacted statutes giving extra employment protections and benefits to veterans, a term typically defined as persons who served in the armed forces during specified wartime periods. Such protections fall into two categories. Applying for appointment or promotion, veterans may be given extra credits on civil service examinations (e.g., Minnesota Statutes #197.45; California Ed. Code #13735; New York C.S.L. # 75). It would appear that veterans benefits, such as salary credit for military service, would be a mandatory subject of negotiations.

5. Contract performance

The converse of job security legislation are laws designed to protect public employers against the loss of their employees at inopportune times. New Jersey Statutes #18A:26-10, provides that a teacher may not leave his position during the school year without permission from the board of education. The sanction for violation of this duty is that the teacher may lose his certification for up to one year. A number of states have enacted statutes designed to afford public employers similar protections, e.g., South Dakota (#13-43-9), Kansas (#72-5412) and Alabama (#361(L)).

6. Sick leave and personal leave

Every state appears to have enacted some legislation on sick leave. Obviously, Congressional treatment of state minimums or state maximums will be of intense interest to public management and public employee unions. Certainly, all such legislation would appear to be preempted by extension of NLRA coverage to the public sector. To illustrate the kind of legislation involved, full-time civil service employees in the California educational system accumulate 12 days of sick leave per year (California Ed. Code #13651.1), as well as bereavement leave (California Ed. Code #13651.4). Teachers in California accumulate 10 days sick leave a year (California Ed. Code #13468) which, pursuant to rules of the state board of education, may be transferred to other school districts (California Ed. Code #13468.1). Moreover, such sick leave can be used not only for reasons relating to illness, but also whenever the teacher must appear in court as a litigant or as a witness under an official order (California Ed. Code #13468.5). Under Florida Education Law #231.40, a full-

time teacher is entitled to sick leave because of his illness "or because of the illness or death of father, mother, brother, sister, husband, wife, child, or other close relative, or member of his own household,". A teacher is entitled to 10 days of sick leave with pay as of the beginning date of employment and accumulates 10 days a year up to 120 days. One-half of his accumulated sick leave is transferrable if the teacher accepts employment in another school district within the state. Florida law also mandates personal leave without pay (Florida Ed. Law #231.43). On the other hand, Arkansas and Florida prohibit payment for unused sick leave, a provision frequently sought and sometimes negotiated in public employment.

8. Military leave

Minnesota (General Statutes #192.26) provides its state and municipal employees with 15 days military leave with pay while in the reserves or some branch of the state or national militia. In New York State, military leave with pay is mandated for up to 30 days (New York State Military Law #242; various other protections and benefits are accorded to employees on military leave by Military Law #243: see also New Jersey Ed. Law #18A:6-33). It is virtually certain that all states make some provision for military leave.

9. Maternity leave

Maternity leave is of particular interest. It is required by the statutes of many states (see New Jersey Law Against Discrimination #10:5-1 et seq.), but some laws went so far as to mandate suspension or termination of employment to a degree that violated the federal constitution (Cleveland Board of Education

et al v. La Fleur; Cohen v. Chesterfield County School Board et al, 414 U.S. 632 (1974)). In some instances, the protections afforded by state laws exceed constitutional requirements. For example, it is suggested in Footnote 13 of the Cleveland decision that school authorities may establish a fixed time during pregnancy for the commencement of maternity leave without violating the Due Process clause of the 14th Amendment to the United States Constitution. This can not be done under New York State Law (New York State Executive Law #296.1(a)) as interpreted by Union Free School District No. 6 of the Towns of Islip and Smithtown et al v. New York State Human Rights Appeal Board, 35 N.Y.S. 371, (1974). The Smithtown decision dealt directly with the question of whether a collectively negotiated agreement could diminish maternity leave benefits below those mandated by state law, but still sufficient to satisfy the due process requirements of the Constitution. The decision held that under state law, such reduction of maternity leave benefits was a prohibited subject of bargaining. Of course, whether it would be under H.R. 9730 is another matter.

10. Lunch periods

Several states have enacted a duty free lunch period for employees, either by statute or by state regulation. For example, the New Jersey Administrative Code (#6:3-1.15) provides for a duty-free lunch period for teachers, whereas California provides the same benefit by statute (California Ed. Code #13561 and 13561.1).

11. Wages

As previously noted, the Federal Fair Labor Standards Act preserves states'rights to establish higher minimum wages than

those contained in federal law. Under extension of the NLRA to public employment, it is an interesting question which, if any, of the following would service preemption on the theory that they constitute minimum wage laws.

a. Minimum salary schedules

New Jersey is one of many states that has enacted a minimum salary schedule for teachers (New Jersey Ed. Law #18A:29-70. It also requires yearly increments (#18A:29-8) and provides credit for increment purposes when teachers are in military service (#18A:29-11). Pennsylvania also mandates minimum salaries and increments (Pennsylvania Education Law #11-1142). Moreover, its laws require an additional increment when a teacher has a master's degree (#11-1114) and mandates extra compensation for teachers when they attend school meetings (#11-1108).

b. Prevailing wages

New York State has a prevailing wage statute for laborers, workmen and mechanics employed by the state and municipal governments if they are not allocated to civil service grade (New York State Labor Law #220). Civil service employees in larger school districts in California must be paid wages "at levels at least equal to the prevailing salary or wage for the same quality of service rendered to private employees under similar employment when such prevailing salary or wage can be ascertained..." (California Ed. Code #13601.5).

c. Miscellaneous

Pursuant to Indiana law (Indiana Statutes #28-4505), a teacher may not have his compensation diminished because a school closes during the school year.

Under California law (California Ed. Code #13506) salaries must be uniform for teachers of various grades. Moreover, the school district may not decrease the annual salary of a person employed by the district in a position requiring certification qualifications for failing to meet any requirement of the district that such person complete additional educational units, course of study, or work in any college or university or any equivalent thereof (California Ed. Code #13511).

d. Procedures

A recent decision of a lower court in New York State (Campbell v. Lindsay, 78 Misc. 2d 841 (sup.ct., NY Co., 1974)) illuminates the relationship between wage benefits mandated by statute and collective agreements. Notwithstanding the salary scales contained in an agreement between police officers and the City of New York and the availability of arbitration to resolve grievances, police officers who worked out of title were held to be entitled to the benefits of the procedural and substantive provisions of the Administrative Code of the City of New York (#434a-3.0, subdivision d; #434a-15.0). This included the right to a higher salary and to have that right determined by a court.

12. Union Security

At least two states, Hawaii (Public Employment Relations Act, #3 and 4) and Rhode Island (State Government Employees Law #36-11-2) mandate service fee payments to the bargaining agent by employees who are not members. In Vermont (State Employee Labor Relations Act #941(k)), nonmembers must pay a service fee if they wish to avail themselves of the services of the union to represent them in a grievance. A number of states appear to have made the agency shop a mandatory subject of negotiations, whereas other states, e.g., Kansas, have specifically prohibited such agreements. Many states (including Alaska - Public Employee Relations Act #23.40.220; Kentucky - Firefighters Collective Bargaining Act #12; Minnesota - Public Employment Labor Relations Act #5; New Hampshire - State Government Employees Act #98-c;3; and New York - Taylor Law #208) mandate dues checkoff. On the other hand, under the National Labor Relations Act, union security is a mandatory subject of negotiations. Presumably, any employer under the NLRA could bargain not to grant a recognized or certified union the right to dues checkoff or to a service fee. Conversely, many states prohibit one or another form of union security. Usually this is the effect of laws that prohibit the discharge of employees by reason of their refusal to pay union dues (e.g. New York C.S.L. #75) and that preclude checkoff without the employee's consent (e.g., New York Gen. Mun. Law #93-b). The duty to bargain over union security would appear to supersede these state limitations.

13. Personnel evaluation and personnel records

During the past ten years or so, there has been a considerable amount of state legislation devoted to personnel evaluation. Since 1963 in the field of education alone, 30 states have enacted statutes intended to encourage accountability in education. Thirteen of these statutes enacted since 1967 alone deal with teacher evaluation. The Kansas statute (House Bill 1042, enacted in July, 1973, copy attached) is typical of these statutes, which appear to be prime candidates for preemption under the NLRA. As a matter of fact, the "accountability statutes"often include a number of enactments on other terms ard conditions of employment. For example, the contracting out of educational services is not only authorized but is encouraged in the California and Colorado statutes. Legislation on in-service education is more frequent although the precise number of states which have legislated on the subject is not available. Furthermore, accountability legislation was introduced but not enacted in at least seven states in 1972-73, and it appears that the state legislatures could be enacting legislation while Congress is simultaneously preempting it. (Note Data on accountability legislation is taken from Cooperative Accountability Project, Legislation by the States: Accountability and Assessment in Education (Madison, Wisconsin: State Educational Accountability Repository, November, 1974).

It should be noted that legislation concerning personnel evaluation and personnel files is not always included or categorized as "accountability legislation." For example, Minnesota is not

KANSAS

A statute providing for the evaluation of teachers and other school employees in Kansas was amended by the 1973 State Legislature. The bill is reproduced below in its entirety.

HOUSE BILL NO. 1042
(Enacted in July, 1973)

AN ACT concerning education in public and nonpublic elementary and secondary schools providing for evaluation of teachers and other school employees.

Be it enacted by the Legislature of the State of Kansas

Section 1. It is hereby declared that the legislative intent of this act is to provide for a systematic method for improvement of school personnel in their jobs and to improve the educational system of this state.

Sec. 2. As used in this act, unless the context otherwise requires

(a) "Board" means the board of education of a school district and the governing authority of any nonpublic school offering any of grades kindergarten to 12 in accredited schools

(b) "State board" means the state board of education.

(c) "Employees" means all certificated and noncertificated employees of school districts and similar employees of nonpublic schools.

(d) "School year" means the period from July 1 to June 30

(e) "Accredited" means accredited by the state board, whether the accreditation applies to a single school, to all of the schools of a school district or to one or more nonpublic schools

Sec. 3. Prior to January 15, 1974, every board shall adopt a bona fide written policy of personnel evaluation procedure in accordance with this act and file the same with the state board. Every policy so adopted shall

(a) be prescribed in writing at the time of original adoption and at all times thereafter when amendments thereto are adopted. The original policy and all amendments thereto shall be promptly filed with the state board.

(b) Include evaluation procedures applicable to all employees.

(c) Provide that all evaluations are to be made in writing and that evaluation documents and responses thereto are to be maintained in a personnel file for each employee for a period of not less than three (3) years from the date each evaluation is made.

(d) Provide that commencing not later than the 1974-1975 school year, every employee in the first two (2) consecutive years of his employment shall be evaluated at least two (2) times per year, and that every employee during the third and fourth years of his employment shall be evaluated at least one (1) time each year, and that after the fourth year of his employment every employee shall be evaluated at least once in every three (3) years.

Sec. 4. Evaluation policies adopted under section 3 of this act should meet the following guidelines or criteria

(a) Consideration should be given to the following personal qualities and attributes: Efficiency, personal qualities, professional department, ability, health (both physical and mental), results and performance, including, in the case of teachers the capacity to maintain control of students, and such other matters as may be deemed relevant.

(b) Community attitudes toward, support for and expectations with regard to educational programs should be reflected.

(c) The original policy and amendments thereto should be developed by the board in cooperation with the persons responsible for making evaluations and the persons who are to be evaluated, and, to the extent practicable, consideration should be given to comment and suggestions from other community interests.

(d) Primary responsibility for making evaluations should rest upon administrative staff.

(e) Persons to be evaluated should participate in their evaluations, including an opportunity for self evaluation

Sec. 5. Whenever any evaluation is made of an employee, the written documents thereof shall be presented to the employee, and the employee shall acknowledge such presentation by his signature thereon. At any time not later than two (2) weeks after such presentation, the employee may respond thereto in writing. Except by order of a court of competent jurisdiction, evaluation documents and responses thereto shall be available only to the evaluated employee, the board, the administrative staff making the same, the state board of education as provided in K.S.A. 72-7515, the members of the board of education, the administrative staff of any school to which such employee applies for employment, and other persons specified by the employee in writing to his board.

Sec. 6. Upon request of any board, the state board shall provide for assistance in the preparation of original policies of personnel evaluation or amendments thereto. In the event that any board has failed to file an adopted bona fide policy as provided by this act on or before January 15, 1974, or if any board fails to file any adopted amendment to such original policy within a reasonable time after adoption thereof, the state board may apply penalties as prescribed by rules and regulations applicable to accreditation of schools.

Sec. 7. This act shall take effect and be in force from and after July 1, 1973, and its publication in the statute book.

listed as a state with accountability legislation in the SEAR report cited above, but Minnesota law (125.12, subd. 6(3)) provides: "All evaluations and files generated within a school district relating to each individual teacher shall be available during regular school business hours to each individual teacher upon his written request."

14. Residency requirements

Residency requirements are a frequent concern in public employment. Minnesota law (#125.12, subd. 2) states: "No teacher shall be required to reside within the employing school district as a condition to teaching employment or continued teaching employment." By its Administrative Code (#125.12), New Jersey also precludes a residency requirement.

Municipal employees have sought the enactment of such laws to overcome municipal ordinances imposing residency requirements. There are two kinds of residency requirements imposed by municipal ordinances. Some restrict appointment to municipal employment to residents of the community. For example, New York State's Nassau County (Administrative Code #13-1.0) imposes one year's residency within the county as a prerequisite to obtaining a county job. Other ordinances require municipal employees to maintain residence within the municipality (Ordinances of Buffalo, N.Y., Chapter 1, Sec. 5; Charter of Syracuse, N.Y., #8-12, subd. 2). Municipal ordinances requiring employees to live within a municipality or proximate to it are particularly frequent for police officers (Local Law No.3 of 1970 of Kingston, N.Y.). In some instances, local laws imposing residency requirements are explicitly authorized by state law (New York Public Officers Law #30).

15. Legal defense of employees

Several states have enacted laws by which they undertake the defense of their employees in the event of court action against them for actions performed during the course of the employees's official duties. California Government Code #995 provides for such defense when the employee is subjected to a civil claim. Similar laws have been enacted in New York State with respect to correction officers employed by the state (New York Correction Law #24) and by the Correction department of any city (New York Gen. Mun. Law #50-j). Another New York State law (Public Officers Law #17) differs only in detail and provides similar protection to other state employees. New Jersey goes further. It indemnifies its teachers against both civil and, in some instances, criminal actions (New Jersey Ed. Law #18A:16-6 and 18A"16-61.).

16. Miscellaneous items

The following items are cited merely to illustrate the variety of state enactments subject to preemption in the absence of amendment to H.R. 9730. California (Govt. Code #18006) reimburses state employees for their moving expenses if, by reason of reassignment or promotion, they must relocate. A substantial number of states provide for 1-2 days of paid leave for educational conferences. By its statewide administrative standards, the New Hampshire State Department of Education has established a maximum teaching load for high school teachers. No high school teacher may be assigned a teaching schedule which requires more than five different class preparations for a given day or more than six periods of class instruction. An Arkansas statute (#80-1217) reflects a concern for the protection of an employer interest. It provides that the final month's pay of a teacher

shall be withheld until the teacher submits to the county superintendent his daily register and other required statistical material. Florida statutes specify that teacher contracts shall be for a minimum of 196 work days and that faculty load in the state universities shall be 12 hours. Several state statutes authorize sabbatical leave, but place limits on its duration and support whereas Louisiana mandates sabbatical leave for all educational employees. These are only some of the bits and pieces from a substantial number of statutes dealing with mandatory subjects of bargaining. The principal investigator believes that the education codes alone may well include a thousand or more statutes subject to preemption under the NLRA.

17. Exclusivity and enforcement of remedies

Because of the nature of government, it seems obvious that some accommodation must be made for the right of people to petition their government for the redress of grievances (U.S. Constitution, First Amendment). This right may come into conflict with exclusivity where the grievances relate to employment by the government and where the grievant prefers someone other than his union to carry his petition.

A related issue is how the provisions of the NLRA can be enforced against a state. It should be noted that in Maryland v. Wirtz, 392 U.S. 183 (1968), the Supreme Court recognized that, because of states' sovereign immunity, some of the remedies ordinarily available under the Fair Labor Standards Act might not be available when a state is the employer-defendant. Recently the New York State Court of Claims (PBA v. State of New York, 70 Misc. 2d 335 (1974) dismissed a union claim that the state had violated

a collective agreement because the alleged violation involved no money damages. The court reasoned that only the equitable relief of specific performance could satisfy the complaint and "the equitable powers of the Court of Claims are very limited and are restricted to enforcing a money judgment."

18. Compulsory Arbitration

Several states mandate arbitration to resolve negotiations disputes between their municipalities and their employees. Usually such laws are restricted to public safety occupations (e.g. New York .S.L. #209.4; Pennsylvania SB 1343, L. 1968; Oregon Statutes 243.730, #19), but New York City has enacted a local law covering all employment (N.Y.C. Administrative Code #1173-7.0.c). These laws benefit either governments or their employees, depending upon the particular circumstances of the situation. In general, however, they have been sought by police and firefighter organizations and resisted by many other unions, as well as by public employers.

19. Supervisory employees

The National Labor Relations Act denies its protections to perso employed as supervisors (#2(d)). Supervisory employees in the public sector, however, now enjoy protected rights of organization and negotiations under many state laws (New York Civil Service Law #201.7(a); Florida Statutes #447.003(4); Minnesota Law #179.65(6); New Hampshire Chapter 98-c:I; New Jersey Employer-Employee Relations Act #34:13A-3(d)). In some instances school principals have been held to be entitled to protected status by interpretation of state law (New York - Matter of Hempstead Board of Education, 6 PERB 3002 (1973), affd. Board of Education,

Hempstead v. Helsby, 42 AD 2nd 1056 (1973): affd. NY 2nd (1974)). In other instances, principals have been covered by explicit statutory language (Massachusetts, Minnesota #179.65(6) and New Jersey are examples). Were H.R. 9730 enacted without amendment relating to preemption, it is doubtful whether a state could enact tenure protections or bargaining rights for administrative personnel which Congress deliberately withheld (see Ironworkers Local 207 v. Perko, 373 U.S. 701 (1963)).

Summary and conclusions

There are several perspectives from which to consider the state legislation potentially subject to preemption. One is the perspective of a particular type of law, e.g., retirement legislation. Another perspective is state oriented. Some states have a great deal more legislation than others on terms and conditions of public employment. The ability of some state and local public employers to adjust to federal legislation may be vitally dependent upon the nature and scope of the adjustment, a factor not necessarily apparent from analysis of separate items like retirement or tenure. Furthermore, the state perspectives are essential to understand the politics of preemption. A public employee union in a state with a poor tenure law may be willing to accept preemption of the tenure law for the right to bargain on job security. A public employee union in another state with a strong tenure law may be unwilling to accept preemption of tenure statutes for the right to bargain on job security. Public management may be faced with the same kind of tradeoffs, and its response is likely to be

influenced by its state as well as its national situation. On the other hand, the formulation of national policy appears to require insight into the state by state impact of alternative preemption policies.

Actually, even summaries of state statutes would not provide the complete picture of preemption problems. The Minnesota education code alone includes 26 statutes which would appear to be preempted by NLRA coverage. This list does not include the retirement laws subject to preemption. The Florida education code appears to include 24 items subject to preemption. The Minnesota code includes legislation on mandatory subjects of bargaining not included in the Florida code, and vice versa. On the other hand, state agencies, such as state boards of education, often promulgate regulations on mandatory subjects of bargaining which have the force of law. Such regulations undoubtedly widen the legislative gap between some states and narrow it between others. The same conclusion undoubtedly holds for state civil service and state personnel codes.

It is also as essential to analyze the situation from the standpoint of "no preemption" as it is from the standpoint of preemption. This memorandum has been devoted largely to the situation that would result if state legislation were preempted. It should not be inferred from this that the problems of preemption are necessarily more difficult or more important than the problems resulting from a "no preemption" policy. For example, if there is no preemption, or only the kind of preemption suggested by 13(b) of H.R. 8677, the NLRB probably would have to interpret the statutes and constitutions of all 50 states at one time or another, but probably sooner than later. Every time one

of the parties refused to bargain on an item on the basis that it was not preempted by the NLRA and hence not subject to bargaining, the issue would potentially be subject to appeal to the NLRB. Whether there is a feasible way to have the state courts decide such issues is open to question, to say the least.

As a matter of fact, a variety of alternatives will have to be considered in depth. Some of the more obvious ones are as follows:

1. Complete preemption of state legislation
2. Complete exemption of state legislation
3. Preemption (or exemption) of some state legislation
4. Preemption (or exemption) of some or all state legislation under certain conditions
5. Combinations of (3) and (4) above

Actually, (3), (4), and (5) each encompass a wide range of alternatives which may have to be considered in depth. Again, however, it must be emphasized that all such legislative policy analysis will require comprehensive summaries of the state legislation potentially subject to preemption. The formulation of federal legislation which takes preemption problems into account adequately will be extremely difficult, but it appears to be absolutely essential to constructive national policy and to avoid a flood of litigation concerning preemption issues.